**LOUIS R. DUMONT – State Bar No. 130198**
**JILL W. BABINGTON – State Bar No. 221793**
**CARPENTER, ROTHANS & DUMONT**
**888 S. Figueroa Street, Suite 1960**
**Los Angeles, CA 90017**
**(213) 228-0400 / (213) 228-0401 [Fax]**
**ldumont@crdlaw.com / jbabington@crdlaw.com**

Attorneys for Defendants, SANTA MONICA COMMUNITY COLLEGE DISTRICT, a public entity, [*also erroneously sued herein as "Santa Monica College Police Department"*], CHIEF ALBERT VASQUEZ, SHERYL AGARD, JENNIFER JONES, and TARA CRITTENDEN, public employees

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| Claim of RUSSEL RUETZ,<br><br>Plaintiff,<br><br>vs.<br><br>SANTA MONICA COMMUNITY COLLEGE DISTRICT, a municipal corporation; SANTA MONICA COLLEGE POLICE DEPARTMENT, an operating department thereof; ALBERT VASQUEZ, individually and as Police Chief; KURT TRUMP, individually and as Acting Chief/Sergeant; SHERYL AGARD, individually and as Secretary to the Chief of Police; JENNIFER JONES, individually and as Secretary; TARA CRITTENDEN, individually and as Dispatcher,<br><br>Defendants. | Case No.: CV11-03921 JAK (Ex)<br><br>**REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT**<br><br>**[Fed. R. Civ. P., 12(b)(6); 12(e)]**<br><br>Date: August 1, 2011<br>Time: 1:30 p.m.<br>Courtroom: 750<br><br>Discovery Cut-Off: Not set<br>Final Pre-Trial Conf.: Not set<br>Trial: Not set |

COMES NOW Defendants SANTA MONICA COMMUNITY COLLEGE DISTRICT ("SMCCD"), a public entity, CHIEF ALBERT VASQUEZ, SHERYL

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AGARD, JENNIFER JONES, and TARA CRITTENDEN, public employees, and hereby submit this reply to plaintiff's opposition to the motion to dismiss.

DATED: July 14, 2011

CARPENTER, ROTHANS & DUMONT

By: _____

LOUIS R. DUMONT
JILL W. BABINGTON
Attorneys for Defendants,
SANTA MONICA COMMUNITY COLLEGE DISTRICT, a public entity, ALBERT VASQUEZ, SHERYL AGARD, JENNIFER JONES, and TARA CRITTENDEN, public employees

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

In the First Amended Complaint, the plaintiff has simply copied and pasted the exact set of facts that were alleged in the original Complaint and have added nothing of substance to rectify the deficiencies that existed in the original Complaint. However, as with the original Complaint, once the First Amended Complaint is stripped of the allegations concerning union activity that is not protected under the FEHA, it is clear that there is little but legal conclusions pled.

The plaintiff attempts to assert a First Amendment claim that is premised on involving a matter of public concern simply because it is related to a police department. Yet, the allegations fall squarely in line with recent Ninth Circuit authority that unequivocally declines to offer this type of internal departmental dispute First Amendment protection. Faced with these hurdles, the plaintiff cites to and invites the Court to accept an outdated standard of review for 12(b) motions which ignores the recent impact of the Supreme Court decision in Iqbal, an invitation this Court should decline.

## II. STATEMENT OF LAW

### A. The Plaintiff Misstates The Current Standard of Review And Cites To Pre-Iqbal and Pre-Twombley Decisions That Are No Longer Correct Statements of the Present Pleading Standard.

Plaintiff goes to great length to cite cases that no longer have any applicability in an effort to obtain a more favorable standard of review. [Document 13 – 7:2-28.] However, these cases predate the 2007 Twombly decision or the 2009 Iqbal decision, which have shaped the current pleading standard under Rule 12. While commentators have voiced criticism of the new heightened and demanding standard, it does not change that it is the current state of the law. As noted in the motion, Iqbal ushered in a new two-step approach, where to overcome a motion to dismiss, a claim must allege "sufficient factual

matter, accepted as true, to 'state a claim plausible on its face.'" Ashcroft v. Iqbal, -- U.S. --, 129 S.Ct. 1937, 1949 (2009). This requires that the Court:

> "[I]dentify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then [engage in the second step to] determine whether they plausibly give rise to an entitlement to relief."

Iqbal, 129 S.Ct. at 1950.

Consistent with this are the standards that "[w]here a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief." Id. at 1949 (internal citations removed). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id. (*citing* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Bell Atlantic Corp., 550 U.S. at 555

This is a far cry from the standard posited by the plaintiff – and on which his entire opposition to the motion to dismiss is premised. In fact, the plaintiff entirely fails to address facial plausibility, a central element under Iqbal. It is also worth noting that while plaintiff suggests civil rights cases are subject to a different standard, Iqbal was, in fact, a civil rights case brought by a pre-trial detainee at Guantanamo Bay against the United States Attorney General. Thus, the heightened standard is entirely applicable here, and when considering that plaintiff has failed to address the required elements, it is respectfully submitted that the motion should be granted.

**B. Plaintiff Has Failed To Articulate A Facially Plausible First Amendment Claim.**

Without ever confronting the dispositive cases cited by the defendants in their motion, the plaintiff attempts to put together a mélange of cases to articulate how his involvement in a union embodies a matter of public concern. The first case cited to is Johnson v. Multnomah County, 48 F.3d 420 (9th Cir. 1983). There, the Ninth Circuit restated the Supreme Court's holding in Connick v. Myers, 461 U.S. 138, 146 (1983) - a case cited to by the defendants in their motion to dismiss – that "[s]peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" Johnson, 48 F.3d at 423-24. Or, as put by the Supreme Court, the essential question is whether the speech addressed matters of "public" as opposed to "personal" interest. Connick, 461 U.S. 138, 147 (1983).

Specifically in Johnson, the statements at issue involved references plaintiff made about her supervisor "awarding county contracts as paybacks for favors made by the 'good old boy network.'" Id. at 422. Government corruption is a far cry from what the plaintiff has alleged here, namely that he was a member of a police officer's union and was hindered from communicating with fellow union members as a result of being placed on administrative leave. [FAC, ¶¶ 24-25.] While corruption certainly goes to a societal or community concern, the activities of a police officer's union are inherently intrinsic. What is pointed to by the plaintiff as being a matter of public concern – his status as police officer's union parliamentarian – simply does not rise to the level of a community concern as a matter of law. Notably, further divesting this claim of facial plausibility is that plaintiff never identified the basis for his administrative leave, despite mentioning that a search warrant signed by a magistrate was served by members of the Santa Monica Police Department. [FAC, ¶ 27.]

The second case cited by plaintiff, McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) is similarly unsupportive. In that case, a police officer went to a city council meeting to complaint about not receiving an annual pay raise. The mayor "told plaintiff to 'shut up and sit down' and adjourned the meeting. Later that evening plaintiff was permitted to speak at a second session, but the council refused to respond to the issues he raised. The next day plaintiff was interviewed by a Phoenix television station regarding the dispute . . . ." Id. at 1112. At a meeting the next day, the mayor indicated his desire to fire the officer, and "suggested that a citizen's complaint alleging excessive force . . . be used as a basis to fire plaintiff." Id at 1113. Plaintiff was ultimately fired. Id.

The Ninth Circuit began its analysis by stating that "to address a matter of public concern, the content of the sergeant's speech must involve 'issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." Id. at 1114. Speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." Id. The same is true of "speech that relates to internal power struggles within the workplace," and speech which is of no interest "beyond the employee's bureaucratic niche." Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir.1996). The Court concluded that because plaintiff "purposefully directed to the public both through city council meetings and a television interview" as it related to "the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of great public concern." Id. at 1114-15.

The situation in McKinley is not present in this case. Plaintiff never communicated with elected officials, let alone to a city at a city council meeting or in a television interview. Moreover, plaintiff never communicated concerns about the ability to attract and retain qualified police personnel. In this context, the

fundamental distinction between a city and a California community college district is clear – college districts do not maintain typical police departments like municipalities do, making McKinley entirely inapposite. Instead, at most what plaintiff has alleged our personal disputes between him and his superiors. These internal power struggles within the police department are of no consequence to the general public and, therefore, statements made in that context are not entitled to First Amendment protection.

A case more closely on point relative to the personal dispute issue is the recent Ninth Circuit decision in Desrochers v. City of San Bernardino, 572 F.3d 703 (9th Cir. 2009). The plaintiffs, two San Bernardino County Police Department sergeants, "along with two other SBPD sergeants (Steve Filson and William Hanley), filed an informal grievance against their supervisor, Lieutenant Mitchal Kimball, who headed the Specialized Enforcement Bureau ("SEB"). . . . According to Captain Frank Mankin, who adjudicated the grievance, the complainants alleged that "there was an ongoing and continuing issue relative to a difference of personalities between the four sergeants" and Lieutenant Kimball. Mankin continued: "It was the impression of the four sergeants that the interaction between themselves and Lieutenant Kimball had risen to a level so as to impact the operational efficiency and effectiveness of the units over which Lieutenant Kimball had managerial oversight." The sergeants requested that the department 1) remove Kimball from command of the SEB; 2) formally investigate the charges contained in their grievance; 3) place Kimball on a "[w]ork performance contract"; 4) order Kimball to attend "[i]nterpersonal relations training"; and 5) monitor Kimball's conduct in the future." Id. at 705-06.

The sergeants were not satisfied, and thus filed a formal grievance, alleging a "hostile work environment by his repeated violations" of various internal SBPD policies. The grievance also accused Billdt and Mankin of perpetuating this

environment by "fail[ing] to take appropriate action." Id. at 706. The plaintiffs each provided declarations supporting their grievance.

Plaintiff Desrochers stated that "Lt. Kimball is a very autocratic, controlling and critical supervisor. Everyone that works for him has felt the stress that he brings to every situation [ . . .] He controls and manipulates every conversation until it concludes to his satisfaction. He absolutely discourages any dissention [sic] from his opinion and gives the definite sense that anyone that disagrees with his approach is incompetent . . . . He operates in the belief that everyone around him is incompetent and that, without his influence, the police department would quickly fail." The other plaintiff, Sergeant Lowes, "asserted that Kimball's 'approach and tactics were destroying the moral [sic] and confidence of his men.'" Id. at 706. This included "Kimball "chew[ing] out" Lowes in front of members of the Rialto Police Department, implying that the other department was incompeten[t]." Id. Ultimately, the two officers opined that Lieutenant Kimball's actions were having a negative effect on the unit's confidence and functionality. The grievance was ultimately denied. Id. at 707.

Against this background, the Ninth Circuit flatly rejected a First Amendment claim by these two police officers, stating:

> "Desrochers and Lowes attempt to characterize their grievances as necessarily implicating issues such as the "competency," "preparedness," "efficiency," and "morale" of the SBPD. We are not persuaded. **We have never held that a simple reference to government functioning automatically qualifies as speech on a matter of public concern**. To the contrary, as we have recently indicated, **the fact that speech contains "passing references to public safety[,] incidental to the message conveyed" weighs against a finding of public concern . . . . The reality that poor interpersonal relationships amongst coworkers might hamper the**

> **work of a government office does not automatically transform speech on such issues into speech on a matter of public concern.**" Id. at 710-11 (emphasis added).

The Ninth Circuit went on to state that "[t]he speech in question is largely devoid of reference to matters we have deemed to be of public concern. There are no allegations of conduct amounting to 'actual or potential wrongdoing or breach of public trust.' One can read the grievances and conclude that Kimball was arrogant, Boom was irreverent, and Mankin and Billdt disagreed with the sergeants' assessment of their lieutenants, but that does not mean they were incompetent, and it certainly does not mean that they were malfeasant." Id.

The conduct in Desrochers goes far beyond the plaintiff's skeletal allegations here. Ruetz does not suggest that he was intimidated by superiors or that their perceived irreverence impacted his speech. He simply contends that he could not communicate with colleagues while on administrative leave after a separate and distinct law enforcement agency returned search warrants against him, which had the negligible, and perhaps merely incidental, impact of hindering his union efforts. [FAC 25-27]. This falls squarely in line with the most current of Ninth Circuit jurisprudence in Desrochers, in that passing references to public safety, which largely are absent here, that are incidental to the message conveyed, weighs firmly against a finding of public concern. Instead, what is clear from both plaintiff's original and amended complaint is that the alleged statements were little more than personal disputes. As such, there is no element of public concern and this cause of action should be dismissed.

**C. The Plaintiff Has Failed to Articulate A Facially Plausible Monell Claim Against the Community College District.**

It should be noted from the outset that if the plaintiff's First Amendment claim is dismissed, the Monell claim must necessarily fail. See Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978).

Second, plaintiff's reliance on McKinley to support his proposition that an act by a single officer can constitute an official policy is misplaced in the context of a community college district. There, the officer who engaged in the misconduct was the city manager, the person vested with authority to make final policy decisions on behalf of the municipality. McKinley, 705 F.2d at 1116-17 ("[P]ersonnel decisions of the city manager represented 'official city policy.' In light of this testimony and the overall structure of Eloy's government, it is undeniable that City Manager Fuller was an official whose edicts or acts may fairly be said to represent official policy.") But the plaintiff cannot contend that a community college district, whose very operation is governed by Division 7 of the California Education Code (Education Code § 70900 *et seq.*), is similar to an independent municipality. For starters, community college districts must act through their board of trustees. Education Code § 70902. See EDUC. CODE § 70902(a)(1) ("Every community college district shall be under the control of a board of trustees, which is referred to herein as the 'governing board.'"). There is no city manager. Moreover, the permissible establishment of a community college district police department is firmly subjected to the authority and control of the board. See CAL. EDUC. CODE §§ 72330-72332. As such, this case is firmly distinguishable from that of McKinley and the plaintiff's bare assertion of authority is not sufficient to meet the facially plausible showing required under Iqbal and Twombly.

**D. Plaintiff's FEHA Claims Are Not Plausible Where They Rely on Vague Legal Conclusions and Are Premised on Unprotected Activities.**

As noted in the motion, union advocacy is not a protected activity under the FEHA. CAL. GOVT. CODE § 12940(a); CAL. CODE REGS., tit. 2, § 7287.8(a). As such, the numerous allegations in the First Amended Complaint that speak solely to that conduct is irrelevant for purposes of the FEHA claims. When stripped of

these non-actionable allegations, it is clear that plaintiff's complaint is nothing but legal conclusions. For example, in his opposition, he states that he was placed on embarrassing and demeaning "administrative leave." [Document 13, 10:10-13]. However, plaintiff never describes what made the administrative leave embarrassing or demeaning. Nor does it show how the employer's action substantially and materially adversely affected the terms and conditions of the plaintiff's employment. See Akers v. County of San Diego, 95 Cal.App.4th 1441 (2002). As such, the vague and conclusory allegations of "lack of promotion, counseling, involuntary administrative penalty, denial of benefits, ostracism, negative evaluations, negative comment sheets, reassignments, retaliation, and other acts and conduct" are insufficient to satisfy the plaintiff's pleading requirement under Iqbal.

With respect to the harassment cause of action, plaintiff identifies several statements that he believes amounted to harassment, yet fails to give an indication of the frequency, intensity, or timeliness with which the alleged acts occurred (e.g., "Did each alleged act occur once in four years" or "on a daily or weekly basis?"; What alleged incidents occurred "within the FEHA's one-year statute of limitations (§ 12960)?") –questions to which California courts require answer before a pleading can be considered sufficient. Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 613 (1989). Indeed, without such facts, plaintiff has not presented evidence of a facially plausible claim, as they can readily be considered isolated events.

As to the discrimination claim, plaintiff purports to be making a disparate impact claim. [Document 13, 8:18-20.] However, again, there are no factual allegations to support this. The gist of a disparate impact claim is that "a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, . . . had a disproportionate adverse effect on members of [a] protected class." Guz v. Bechtel National, Inc. 24 Cal.4th 317, 354, fn. 20 (2000).

Yet, plaintiff has not – and cannot – point to any employer practice or policy that manifests itself in the off-handed comments of two secretaries. Nor does plaintiff allege that such a policy exists. Consequently, the First Amended Complaint cannot be amended in any way so as to make this claim viable under Iqbal.

## III. CONCLUSION

Based upon the foregoing, the defendants respectfully request that this Court grant the instant Motion to Dismiss with prejudice without affording the plaintiff the opportunity to amend.

DATED: July 14, 2011

CARPENTER, ROTHANS & DUMONT

By: _____

LOUIS R. DUMONT
JILL W. BABINGTON
Attorneys for Defendants
SANTA MONICA COMMUNITY COLLEGE DISTRICT, a public entity, ALBERT VASQUEZ, SHERYL AGARD, JENNIFER JONES, and TARA CRITTENDEN, public employees